A

AZRELL MOHAMAD v. NATIONAL AEROSPACE & DEFENCE INDUSTRIES SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AMARJEET SINGH SERJIT SINGH J
[CIVIL APPEAL NO: WA-16A-15-04-2023]
B 5 JUNE 2024

Abstract – *The intention of parties would determine whether an employment contract is a genuine fixed-term contract or is a sham or dressed-up fixed contract that amounts to permanent employment. A contract of employment is not a genuine fixed term contract when there is an employment on a permanent basis, and where the nature of the work is not a project-based or seasonal type of work but the type that a permanent employee would do. In such circumstances, the termination of a claimant amounts to a dismissal without just cause and excuse.*

C

D

LABOUR LAW: *Employment – Contract of employment – Type of – Whether genuine fixed term contract – Intention and conduct of parties – Whether there was permanent nature to claimant's position in company – Whether claimant treated as permanent employee – Whether termination of claimant amounted to dismissal without just cause and excuse*

E

CONTRACT: *Termination – Contract of employment – Type of – Whether genuine fixed term contract – Intention and conduct of parties – Whether there was permanent nature to claimant's position in company – Whether claimant treated as permanent employee – Whether termination of claimant amounted to dismissal without just cause and excuse*

F

The claimant commenced employment as Finance Manager with PJS Industries Sdn Bhd, the largest shareholder of National Aerospace & Defence Industries Sdn Bhd ('company'). The claimant was then transferred to the company effective 1 September 2006 and in a letter dated 23 February 2011, the claimant resigned from the company. The claimant was then offered *vide* letter dated 10 June 2013 the post of General Finance Manager on a contractual basis. The offer was accepted by the claimant. Thereafter, the contract was renewed year after year for a period of seven years. In a letter dated 18 January 2021, the company informed the claimant that his services would be extended for only one month, from 2 January 2021 to 31 January 2021, and thereafter terminated. The claimant treated his termination by the company as a dismissal without just cause and excuse while the company's position was that the claimant was under a fixed term contract whose services *vide* the contract had expired. It was the claimant's case that the company's actions of consistently renewing the claimant's contract every year was

G

H

I

evidence that the claimant was in permanent employment with the company. The claimant made representations to the Industrial Relations Department under s. 20 of the Industrial Relations Act 1967 that he was dismissed without just cause and excuse. The matter was referred by way of reference to the Industrial Court for adjudication. The Industrial Court, in dismissing the claimant's claim, found that the contract was a genuine fixed-term contract because (i) a comparison between the two types of contract, the one entered into with PJS Industries Sdn Bhd and the fixed term contracts entered into in 2013 and each year thereafter was proof that the earlier contract was a contract of employment with tenure while the latter was for a fixed term *ie* a time limit for the services sought; and (ii) the claimant had understood and accepted the new fixed term contract when the previous contract had expired by voluntarily executing the same which had a period of contract clause. According to the Industrial Court, as long as the provision contained in the offer letter stated that it was a fixed term contract, the employment could not be treated as a permanent employment. Aggrieved, the claimant appealed. The issues that arose were whether the Chairman erred in law and fact (i) in holding that the contract between the claimant and the company was a genuine fixed term contract; (ii) by failing to consider that the company's actions of renewing the claimant's contract year after year, giving the claimant salary increments, and increasing the annual leave was proof that the claimant was a permanent employee; and (iii) in failing to consider the fact that the company had promised that the claimant's employment would be made permanent.

Held (allowing appeal; setting aside award of Industrial Court):

(1) Generally, a fixed-term contract of employment is one where the contractual relationship between an employee and an employer lasts for a specified or definite period. A fixed-term contract lapses upon the expiry of the term stipulated in the contract unless otherwise extended. The contract terminates upon its expiry and need not be terminated by either party. The contract can still be for a fixed term if it contains within it a clause enabling either side to terminate the contract on giving notice before the term expires. (para 17)

(2) The intention of the parties would determine whether the contract was a genuine fixed-term contract or was a sham or dressed-up fixed contract that amounts to permanent employment. The claimant was employed as General Finance Manager and then promoted to Senior General Finance Manager. There was a permanent nature of the position in the finance department of the company. The intention of the company was clearly to renew unfailingly the contract of employment without making the same permanent. It did so for seven years. This conduct of the company showed that the fixed term contract was not out of genuine necessity but as a means of control and subjugation of the claimant. (para 23)

(3) The subsequent conduct includes the total duration or length of service with the company (*Ahmad Zahri Mirza Abdul Hamid v. AIMS Cyberjaya Sdn Bhd*). Herein, the total length of service was seven years and the claimant was doing the same work as General Finance Manager and then as Senior General Manager of Finance. During this period, he was treated like a permanent employee receiving salary increments and an increase in annual leave and promotion. The claimant did not have to apply for each renewal. (para 24)

(4) The claimant worked with the company as a Finance Manager before he resigned. The claimant was offered back to the company as General Finance Manager and subsequently promoted to Senior General Finance Manager. The nature of the work was related to the company's finance department. Thus, a fixed term contract in these circumstances led to the conclusion that the contract was not a genuine fixed-term contract. The nature of work was not the project-based or seasonal type of work but the type that a permanent employee would do. (para 26)

(5) The contract of employment was not a genuine fixed term contract but there was an employment on a permanent basis dressed up as several fixed term contracts. In the circumstances, the termination of the claimant amounted to a dismissal without just cause and excuse. This was a proper case for appellate interference. (para 28)

Case(s) referred to:

Ahmad Zahri Mirza Abdul Hamid v. AIMS Cyberjaya Sdn Bhd [2020] 6 CLJ 557 FC ***(refd)***
Colgate Palmolive (M) Sdn Bhd v. Yap Kok Foong [1998] 3 ILR 843 ***(refd)***
Firex Sdn Bhd v. Cik Ng Shoo Waa [1990] 1 ILR 226 ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] CLJU 30; [1981] 1 LNS 30 FC ***(refd)***
Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors [1996] 4 CLJ 747 CA ***(refd)***
M Vasagam Muthusamy v. Kesatuan Pekerja-pekerja Resorts World, Pahang & Anor [2003] 5 CLJ 448 HC ***(refd)***
Ong Leong Chiou & Anor v. Keller (M) Sdn Bhd & Ors [2021] 4 CLJ 821 FC ***(refd)***
Robert Henry Hawkins v. Rusch Sdn Bhd & Rusch Asia Pacific Sdn Bhd [2010] 4 ILR 175 ***(refd)***
Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 SC ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 20, 30(5)

For the appellant - Nur Fatin Nabilah Sallehudin & Ummi Huda Hasni; M/s A Azidin & Shahrul
For the 1st respondent - Muhammad Syafiq Amani Md Sabri; M/s Mahadi Redzuan & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

[1] On 22 January 2024, I allowed the appeal by the appellant, Azrell bin Mohamad, by setting aside the award of the Industrial Court, which had dismissed his claim of constructive dismissal by his then employer, National Aerospace & Defence Industries Sdn Bhd. The claim in the Industrial Court was made pursuant to s. 20 of the Industrial Relations Act 1967.

[2] This judgment contains the reasons for my decision. In this judgment, the appellant will be referred to as "the claimant" and his employer as "the company".

Background Facts

[3] The claimant commenced employment on 19 November 2003 as Finance Manager with PJS Industries Sdn Bhd, which was the company's largest shareholder. In accordance with the clause on transfer and transferability contained in the employment contract, the claimant was transferred to the company effective 1 September 2006. In a letter dated 23 February 2011, the claimant resigned from the company and his resignation was accepted on 17 March 2011.

[4] Interestingly, the claimant was offered, *vide* letter dated 10 June 2013, the post of General Finance Manager on a contractual basis for the period 17 June 2013 to 31 December 2013. The offer was accepted by the claimant. Thereafter, his contract period was extended for the following periods:

(i) appointment letter dated 27 November 2013 for the period 1 January 2014 to 31 December 2014;

(ii) appointment letter dated 16 December 2014 for the period 1 January 2015 to 31 December 2015;

(iii) appointment letter dated 21 December 2015 for the period 1 January 2016 to 31 December 2016;

(iv) appointment letter dated 16 December 2016 for the period 1 January 2017 to 31 December 2017;

(v) appointment letter dated 20 December 2017 for the period 1 January 2018 to 31 December 2018;

(vi) appointment letter dated 9 January 2019 for the period 1 January 2019 to 31 December 2019; and

(vii) appointment letter dated 15 January 2020 for the period 1 February 2020 to 31 December 2020.

[5] In a letter dated 18 January 2021, the company informed the claimant that his services would only be extended only for one month, that is, from 2 January 2021 to 31 January 2021, and thereafter terminated. The claimant treated his termination by the company as a dismissal without just cause and excuse while the company's position was that the claimant was under a fixed-term contract whose services *vide* the contract had expired on 31 December 2021.

[6] It was the claimant's case that the company's actions of consistently renewing the claimant's contract every year is evidence that the claimant is in permanent employment with the company. The claimant made representations to the Industrial Relations Department under s. 20 of the Industrial Relations Act 1967 that he was dismissed without just cause and excuse. The matter was referred by way of reference to the Industrial Court for adjudication. The Industrial Court adjudicated the matter and ultimately dismissed the claim.

The Award Of The Industrial Court

[7] The learned Chairman of the Industrial Court ("the learned Chairman") applied the established law on the function of the Industrial Court, which was to determine whether the claimant was dismissed and secondly that his dismissal was with just cause and excuse. In this regard, it is recognised that any act which has the effect of bringing the employment contract to an end and the means resorted to by an employer is of little significance. This is because the law recognises that any contractual termination, constructive "dismissal", non-renewal of contract, forced resignation, or retrenchment are all species of the same genre, which is, "dismissal" (see *Goon Kwee Phoy v. J & P Coats (M) Bhd* [1981] CLJU 30; [1981] 1 LNS 30; [1981] 2 MLJ 129; *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298; and *Colgate Palmolive (M) Sdn Bhd v. Yap Kok Foong* [1998] 3 ILR 843).

[8] The learned Chairman said that he was guided by s. 30(5) of the Industrial Relations Act 1967, which in its sweep required him to decide cases according to equity and 'good conscience' by considering the substantial merits of the case rather than on technical matters (*Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors* [1996] 4 CLJ 747).

[9] The main issue before the learned Chairman was whether the contract between the claimant and the company was a genuine fixed-term contract or otherwise a contract of employment. If it was the latter, then the question arises whether there was a dismissal and if there was, whether the dismissal was with just cause or excuse. In this regard, the learned Chairman applied the law as stated in *M Vasagam Muthusamy v. Kesatuan Pekerja-pekerja Resorts World, Pahang & Anor* [2003] 5 CLJ 448; [2003] 5 MLJ 262; [2005] 5 AMR 552. In this case, the test was stated as follows:

> ... the Industrial Court had correctly addressed the issue in this case by determining first whether or not the contract in question was as genuine fixed term contract. *If the Industrial Court made a finding that it was not a genuine fixed-term contract but was really a contract of employment, then only would the Industrial Court be required to ask whether there was a dismissal or not and that if so whether it was with just cause or excuse*. In the instant case, since a finding was reached that the contract concerned was indeed a genuine fixed-term contract, the question of there being a dismissal or not does not arise. Once it is established that there is a genuine fixed-term contract, the dissolution of the contract upon reaching the expiry date of the fixed term would clearly spell the end of the worker's tenure with the relevant company.
>
> (emphasis added)

[10] In arriving at his decision, that the contract was a genuine fixed-term contract, the learned Chairman found the following: (i) a comparison between the two types of contract, the one entered into with PJS Industries Sdn Bhd in 2003 and the fixed terms contracts entered into beginning in 2013 and each year thereafter was proof that the earlier contract was a contract of employment with tenure while the latter was for a fixed term *ie*, a time limit for the service sought, and (ii) the claimant had understood and accepted the new fixed term contract when the previous contract had expired by voluntarily executing the same which had the following "period of contract" clause:

> Upon termination, should your service be further renewed or extended on several occasions, at your own request, you are not deemed to be our permanent staff unless it is expressly stated in our letter of appointment.

[11] The learned Chairman found the above provision crucial, in that, according to him, by virtue of the above provision, the company had the mandate to continue the contract based on need and there is no provision in the appointment letter stating that the claimant is a permanent employee. The reasoning of the learned Chairman was that notwithstanding the fixed-term contract was entered into year after year for a period of seven years but as long as the provision contained in the offer letter states that it is a fixed-term contract, the employment cannot be treated as a permanent employment. For this proposition, reference was made to *Robert Henry Hawkins v. Rusch Sdn Bhd & Rusch Asia Pacific Sdn Bhd* [2010] 4 ILR 175, an Industrial Court, where it was held as follows:

> Hence, just because the contract was renewed without any break cannot by itself convert a fixed-term contract into a permanent one. The claimant has to show something more, ...

[12] The claimant had raised questions about the extension of his contract, which was done several times as justification that he is actually a permanent employee. The learned Chairman disagreed with the position taken by the claimant which he found was against the company's intention and policy

based on the execution of a new fixed-term contract after the expiry of the earlier fixed-term contract. In this regard, the learned Chairman cited *Firex Sdn Bhd v. Cik Ng Shoo Waa* [1990] 1 ILR 226, where it was said:

> It is well established that it is for management to decide the strength of its staff which it considers necessary in its undertaking. The court will not intervene unless it is shown that the decision was capricious or without reason or was *mala fide* or was actuated by victimisation or unfair labour practice.

[13] The learned Chairman said that in the instant case, there was no issue of termination or dismissal as the contract was a fixed-term contract that came to an end on 31 December 2020. Accordingly, the learned Chairman held that there was no dismissal and dismissed the claimant's claim.

Grounds Of Appeal

[14] The grounds of appeal are found in the memorandum of appeal, which can be summarised as follows due to the over-lapping of the grounds:

(i) the learned Chairman erred in law and fact in holding that the contract between the claimant and the company was a genuine fixed-term contract when it was not a fixed-term contract;

(ii) the learned Chairman erred in fact and in law by failing to consider the company's actions of renewing the claimant's contract year after year, giving the claimant salary increments, and increasing the annual leave is proof that the claimant is a permanent employee; and

(iii) the learned Chairman erred in fact and law in failing to consider the fact that the company had promised that the claimant's employment would be made permanent.

Analysis And Decision

[15] The function of the court sitting on appeal is trite. The duty of the court is to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or established evidence or is plainly wrong in arriving at its decision. (See *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1; *Ong Leong Chiou & Anor v. Keller (M) Sdn Bhd & Ors* [2021] 4 CLJ 821).

[16] At the heart of this appeal is the issue of whether the claimant is employed under a genuine fixed-term contract or is a permanent employee of the company. The claimant's case before the Industrial Court was that his contract of employment with the company was permanent in nature and not a genuine fixed-term contract.

[17] Generally, and I use the word advisedly due to subsequent development of the law, that a fixed-term contract of employment is one where the contractual relationship between an employee and an employer

lasts for a specified or definite period. A fixed-term contract lapses upon the expiry of the term stipulated in the contract unless otherwise extended. The contract terminates upon its expiry and need not be terminated by either party. The contract can still be for a fixed term if it contains within it a clause enabling either side to terminate the contract on giving notice before the term expires.

[18] The Industrial Court as shown gave a literal construction of the contract which had a fixed term period clause and found that the claimant in the "acknowledgment" to accept or otherwise the contract had clearly said that he had read and understood the conditions of the contract offered to him. The learned Chairman found that the claimant had voluntarily accepted the terms, knowing what the clause meant *ie*, that "upon termination, should your service be further renewed or extended on several occasions, at your own request, you are not deemed to be our permanent staff unless it is expressly stated in our letter of appointment". Thus, it did not matter even if the claimant year after year was offered a contract for a fixed term as it was, according to the learned Chairman, against the company's policy. The contract that had expired ceased to have any effect. Thus, there was no continuity of employment when the claimant entered into the new contract.

[19] The claimant contended that the law on whether a contract is a genuine fixed-term contract has been propounded by the Federal Court in *Ahmad Zahri Mirza Abdul Hamid v. AIMS Cyberjaya Sdn Bhd* [2020] 6 CLJ 557; [2020] 3 MLRA 475. It was recognised that using a fixed-term contract employee had become a trend, particularly where employees are engaged on a project basis where the contract of employment is for a specific period of time *ie*, with a defined end.

[20] The main issue that presents itself in fixed-term contracts according to the Federal Court is whether there is a genuine fixed-term contract or there is employment on a permanent basis dressed up as several fixed-term contracts. What was never done before was the enunciation of the test applicable to answer the issue.

[21] The Federal Court explained, after a review of numerous authorities, that judicial treatment regarding the question of whether an employer had a genuine need for the service of an employee for a fixed duration may be divided into three consideration points:

(i) the intention of the parties;

(ii) the employer's subsequent conduct during the course of employment; and

(iii) nature of the employer's business and nature of work which an employee is engaged to perform.

[22] I would now undertake the exercise as this was not done by the Industrial Court as it did not apply the law in *Ahmad Zahri Mirza*.

The Intention Of Parties

[23] The intention of the parties would determine whether the contract was a genuine fixed-term contract or was a sham or dressed-up fixed contract that amounts to permanent employment. This can be determined by the action of the employer. The material facts show that the claimant was employed as General Finance Manager and then promoted to Senior General Finance Manager. There was a permanent nature of the position in the Finance Department of the company. The intention of the company was clearly to renew unfailingly the contract of employment without making the same permanent. It did so for seven years. This conduct of the company showed that the fixed-term contract was not out of genuine necessity but as a means of control and subjugation of the claimant.

Company's Subsequent Conduct During Employment

[24] The subsequent conduct according to *Ahmad Zahri Mirza* includes the total duration or length of service with the company. Here, the total length of service was seven years and doing the same work as General Finance Manager and then as Senior General Manager of Finance. During this period, he was treated like a permanent employee receiving salary increments and an increase in annual leave and promotion.

[25] The claimant did not have to apply for each renewal. Here, the "acknowledgment" when accepting a new contract is crucial: it states that, "I, ... having read and understood the terms and conditions stipulated in the contract of service of the contract and hereby agree to accept the appointment as Senior General Manager Finance with effect from ..."

Nature Of Company's Business And Nature Of Work

[26] The next consideration is the nature of the company's business and the nature of the work that the claimant was engaged to perform. This factor would determine the true character of the contract. The history of this case shows that the claimant worked with the company as a Finance Manager before he resigned. The claimant was offered back to the company as General Finance Manager and subsequently promoted to Senior General Finance Manager. The nature of the work was related to the company's Finance Department. Thus, a fixed-term contract in these circumstances leads to the conclusion that the contract was not a genuine fixed-term contract. The nature of work is not the project-based or seasonal type of work but the type that a permanent employee would do.

Conclusion

[27] I find that there was an insufficient appreciation of the facts and relevant law, in particular, the principle in *Ahmad Zahri Mirza*. There was a failure to consider relevant factors and irrelevant factors were considered. The decision was therefore plainly wrong on fact and law.

[28] The contract of employment was not a genuine fixed-term contract but there is an employment on a permanent basis dressed up as several fixed-term contracts. In the circumstances, the termination of the claimant amounted to a dismissal without just cause and excuse.

[29] In the upshot, this was a proper case for appellate interference.

Conclusion

[30] For the aforesaid reasons, I allow the appeal and set aside the award of the Industrial Court. The matter is remitted to the Industrial Court for a proper assessment of compensation.